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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN DEMOCKER, Defendant.	**P1300CR201001325** **RESPONSE re: STATE'S MOTION PURSUANT TO RULE 15.3 FOR DEPOSITION OF WITNESS JOHN SEARS AND ORDER FOR EXPEDITED HEARING** **(Hon. Warren Darrow)**

The Defendant, by and through undersigned counsel, hereby Responds to the state's "Motion Pursuant to Rule 15.3 for Deposition of Witness John Sears and Order for Expedited Hearing" (hereinafter "Rule 15.3 Motion"). The Defendant does not waive any of his Rights concerning attorney-client-privilege, the 6th Amendment of the U.S. Constitution, § 2, Articles 3, 4 and 24 of the Arizona Constitution, and Due Process of Law per the 5th Amendment of the U.S. Constitution.

Rule 15.3, Arizona Rule of Criminal Procedure, "Depositions," states, in the applicable part:

> a. **Availability**. Upon motion of any party or a witness, the court may in its discretion order the examination of any person except the defendant and those excluded by Rule 39(b) upon oral deposition under the following circumstances:

(1) A party shows that the person's testimony is material to the case and that there is a substantial likelihood that the person will not be available at the time of trial, or

(2) A party shows that the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense, that the person was not a witness at the preliminary hearing or at the probable cause phase of the juvenile transfer hearing, and that the person will not cooperate in granting a personal interview ...

(16A A.R.S. Rules Crim.Proc., Rule 15.3).

In its 15.3 Motion, the state seeks a"deposition of material witness John Sears." (Rule 15.3 Motion, pg. 1). As this Court knows, Mr. Sears was a vital part of the original Defense team for Mr. Democker in the old cause number CR 2008-1339 (which contained most of the charges in the current Indictment, and most importantly, the murder charge). The state's 15.3 Motion is broken down into sections, which the Defense will address in order:

A. Calloway club cover

The state wrote:

"... Defendant told YCSO he gave the Calloway golf club cover to his attorney John Sears a few days after the murder. Later that same day, YCSO retreived the Calloway golf club cover from Mr. Sears in Prescott."

Here, the state claims to have a statement made by the Defendant about the club cover, YCSO witnesses to the retrieval of the club cover, and the actual club cover. What else is there to know? The Rule 15.3 Motion does not specify any reason(s) the state requires a deposition with Mr. Sears regarding the Calloway golf club cover.

In any event, any communications between the Defendant and Mr. Sears remain confidential and privileged. The Arizona Rules of Professional Conduct, Ethical Rule ("E.R.") 1.6, prohibits Mr. Sears from repeating anything Mr. DeMocker said in confidence. ER 1.6.(a), "Confidentiality of Information," states:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d). or ER 3.3(a)(3).

(17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.6).

To be absolutely clear on this subject, Mr. Democker does NOT give informed consent for Mr. Sears to divulge any confidential and privileged communications between he and Mr. Sears.

B. Anonymous Email and Voice in the Vent

First the Defense must address an inaccurate statement in the state's 15.3 Motion:

> After investigating both matters, it was concluded the voice in *the vent story was totally fabricated by Defendant* and Charlotte DeMocker, under the direction of the Defendant, admitted to sending the anonymous email to Mr. Sears.

(15.3 Motion, pg. 3, italics added).

There is no evidence that the voice in the vent was not real, and giving real information. Where the state said: "it was concluded," what that really means is that the state, alone, concluded it. This is a trial issue, not fodder for a fishing expedition with Mr. Sears.

Also, the Defense does NOT agree that the "waiver" given by Mr. Sears to the state before the Defendant's "free-talk-type" discussion with the state was any more that a one-day-waiver on a specific subject. It was NOT a waiver of all confidential and privileged communications between the Defendant and Mr. Sears. The Court should review the recording of the limited waiver given by Mr. Sears.

The Rule 15.3 Motion does not specify any reason(s) the state requires a deposition with Mr. Sears regarding the voice in the vent. Again, Mr. Democker does NOT give informed consent for Mr. Sears to divulge any confidential and privileged communications between he and

Mr. Sears.

C. Estate of Virginia Carol Kennedy

The "facts" asserted by the state in this section essentially lays out its case. The Defendant disagrees and has pleaded not guilty. The estate of Carol Kennedy is a trial issue, not a basis for a fishing expedition with Mr. Sears. The Rule 15.3 Motion does not specify any reason(s) the state requires a deposition with Mr. Sears regarding the estate of Carol Kennedy. Again, Mr. Democker does NOT give informed consent for Mr. Sears to divulge any confidential and privileged communications between he and Mr. Sears.

D. Request for Interview from John Sears

In this section, the state cut and pasted an e-mail from Mr. Sears, in which Mr. Sears correctly pointed out that he cannot be interviewed, due to the confidential and privileged nature of the communications between he and Mr. DeMocker. Mr. Sears also pointed out prior orders from various courts and the State Bar which would preclude an interview.

This state has not given this Court any a basis for its proposed fishing expedition with Mr. Sears. The Rule 15.3 Motion does not specify any reason(s) the state requires a deposition with Mr. Sears. Again, Mr. Democker does NOT give informed consent for Mr. Sears to divulge any confidential and privileged communications between he and Mr. Sears.

E. Deposition of John Sears

In this section, the state cited Rule 15.3(a)(2)(*supra),* in support of its request for a deposition. In its "Conclusion," the state said: "The State has listed John Sears as a witness in its case in chief." However, simply listing a person as a witness does not make that person a "material witness," nor somebody that will actually be called to the stand at trial.

The state did not address either of the factual prongs required in Rule 15.3(a)(2):

1) The state must show that Mr. Sears' testimony is material to the case; and
2) The state must show that Mr. Sears' will not cooperate in granting a personal interview.

On the latter prong, the Defendant would request that this Court make a specific finding whether or not Mr. Sears' invocation of privilege -- as well as the Defendant's invocation of privilege -- satisfies prong 2. In other words, is Mr. Sears really "uncooperative" per Rule 15.3, if he obeys the mandates of the ethical rules?

As to the "material witness" prong, this Court can look at State v. Jessen, 134 Ariz. 458, 462, 657 P.2d 871, 875 (Ariz.,1982), for guidance. In Jessen, the defendant wanted to depose a prosecutor: "Defendant wished to show discrepancies between the state and defendant's versions of the events surrounding the making of defendant's inculpatory statements to the police." (*Id.*).

The Jessen Court held:

> The testimony of the prosecutor *would have been cumulative of the testimony of the officers*. Defendant has shown no issues concerning the interrogation on which the prosecutor would have been the only person to offer evidence. We have stated that
>
> > "It is within the discretion of the trial court to decide whether a defendant may require a prosecuting attorney to testify in his behalf. (citation omitted) Calling a prosecutor as a witness for the defendant inevitably confuses the distinctions between advocate and witness, argument and testimony, and should be permitted only if required by a compelling need. (citations omitted)" State v. Tuzon, 118 Ariz. 205, 208, 575 P.2d 1231, 1234 (1978).

(*Id.*, italics added).

In this case, there are other witnesses to virtually every point the state made in its Rule 15.3 Motion. Mr. Sears' testimony, therefore, would be cumulative and unnecessary.

The 6th Amendment, of the U.S. Constitution, "Jury trials for crimes, and procedural rights," states, in the applicable part:

"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The 5th Amendment, of the U.S. Constitution, "Due Process of Law" section, states a criminal defendant's Right:

"nor be deprived of life, liberty, or property, without due process of law."

The Due Process Clause requires the state to make a showing that it has satisfied both prongs of Rule 15.3. It has not.

An Arizona civil case is instructive as to whether this Court is required to order the deposition of Mr. Sears to take place:

> *Singer* does not support the proposition that the trial court here was required to order the depositions of opposing counsel nor access to their files.
>
> Appellants had notice of the good faith hearing and had the opportunity to contest the requested good faith determination. Copies of all the relevant correspondence between the attorneys who negotiated the settlement were provided to Hochuli. The trial court did not deny discovery, it only precluded deposing the attorneys for the settling parties. The trial court is vested with wide discretion in matters of discovery and its decision will not be disturbed unless there is an abuse of discretion. Rogers v. Fenton, 115 Ariz. 217, 564 P.2d 906 (App.1977). We find no abuse of discretion.

Barmat v. John and Jane Doe Partners A-D, 165 Ariz. 205, 210, 797 P.2d 1223, 1228 (Ariz.App.,1990).

Conclusion

The taking of a deposition from opposing counsel should be disfavored. It should also be precluded by this Court per A.R.S. § 13-4062(A)(2), which states "A person shall not be examined as a witness in the following cases:"

> An attorney, without consent of the attorney's client, as to any communication made by the client to the attorney, or the attorney's advice given in the course of professional employment.

Simply because Mr. Sears is no longer the active attorney on the case should not change anything. Mr. Democker does NOT give informed consent for Mr. Sears to divulge any confidential and privileged communications between he and Mr. Sears.

> The attorney-client privilege is the oldest of privileges for confidential communications and is "rigorously guarded 'to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.' " State v. Towery, 186 Ariz. 168, 177, n. 6, 920 P.2d 290, 299, n. 6 (1996) (citation omitted). The privilege belongs to the client and encompasses communication between the attorney and client made in the course of the attorney's professional employment. State v. Holsinger, 124 Ariz. 18, 22, 601 P.2d 1054, 1058 (1979). "Neither the client nor the attorney can be compelled to disclose these communications against the client's wishes." Id.

State v. Sucharew, 205 Ariz. 16, 21, 66 P.3d 59, 64 (Ariz.App. Div. 1,2003)

The taking of a deposition of Mr. Sears will add to the already burdensome time and cost of litigation in this case. Can anyone say that there will not be delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the Mr. Sears testimony?

Add to that the proposition by the state that Sears Deposition be "held in court an on the record"... for "2-3 hours." (Rule 15.3 Motion. pg. 5). A needless burden on everyone.

Finally, deposing an opposing attorney detracts from the quality of client representation. Moreover, the deposition of a defense attorney has a "chilling effect" on the truthful communications from the client to the attorney.

Finally, should this Court entertain granting the state's Rule 15.3 Motion regarding Mr. Sears, then the Defense requests an evidentiary hearing first, in which the state would be required to make a showing that it has satisfied both prongs of Rule 15.3.

For the above stated reasons, the Defendant objects to the deposition of John Sears.

RESPECTFULLY SUBMITTED this July 29, 2011.

Craig Williams
Attorney at Law

A copy of the foregoing delivered to:
Hon. Warren Darrow, Division PTB, Hon. David Mackey, Yavapai County Presiding Judge
Jeff Paupore, Steve Young, Yavapai County Attorney's Office
The Defendant
Greg Parzych, via e-mailed .pdf
by: _____